SYKT. TAN THIAN SIONG SDN. BHD.

v.

SYKT. SIAW TECK HWA REALTY & DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL SUIT NO. 57 OF 1981]
2 NOVEMBER 1982

CIVIL PROCEDURE: *Summary judgment - Appeal against decision of Senior Asst. Registrar - Application for summary judgment disallowed - Claim for goods sold and delivered - Statement of account delivered to defendant - Not queried within 2 weeks as agreed - Whether non-query of an account stated creates an estoppel against defendant from querying accounts thereafter.*

This was an appeal against the dismissal by the learned Senior Assistant Registrar of the High Court, Kuantan of the plaintiff's application for summary judgment. The plaintiff's claim was for the sum of RM105,782.50 being the balance amount due for the supply of earth to the defendant pursuant to the terms of a written contract dated 18 February 1981 entered into between the parties hereto. Although contract was dated 18 February 1981 arrangement between the parties was in effect since June, 1980. The plaintiff had agreed to supply to the defendant at least 4,500 lorry loads of earth in a 30-day period at the rate of RM16.50 per lorry load of 6 cubic yards "as measured on the lorry". It was a term of the contract that the defendant was to settle the plaintiff on a monthly basis and within 7 days of the receipt of a statement of account/invoices of the amounts due and payable at that stage and the statement of account contained an endorsement "if you do not agree with the above balance please inform us within 2 weeks". In fact there was to be an account stated between the parties every month, the plaintiff to deliver a statement of account and the defendant having 2 weeks within which to query the accounts. From time to time certain amounts were paid by the defendant to the plaintiff when there came a situation where a cheque issued by the defendant was dishonoured as it was not arranged for and another cheque which replaced this dishonoured cheque was also dishonoured as payment was stopped on the instructions of the defendant and two other cheques issued in favour of the plaintiff were also dishonoured.

The defendant contended that in October, the quantity of earth supplied was below the required 6 cubic yards and they complained to the plaintiff and on the plaintiff's undertaking to supply the agreed amount in future the defendant's servant/agent continued to issue the usual delivery receipt acknowledging receipt of the lorry loads specifying date, time and volume, in each case 6 cubic yards. However, on 12 January 1981, the delivery receipt did not specify the volume of earth in each lorry load of the 121 loads delivered on that day. After some discussion on that day the delivery of the lorry roads thereafter was acknowledge as being 6 cubic yards. As the plaintiff were not being paid, they stopped delivery.

The defendant filed a statement of defence and counter claimed for certain amounts for the hire of vibrator compactors and overcharging for the hire of certain vehicles.

Held:

[1] The defendants were on notice in October of the lorries not being loaded to the specific capacity and they thereafter continued with the system of issuing of delivery receipts acknowledging even the quantum of earth. The defendants had waived any right to complain that they may have had and cannot now be heard to rake up what was settled by way of the account stated.

[2] The law is that in the event of non-query an account stated came into existence which creates an estoppel against the defendant from querying the accounts thereafter. There are situations for example if there was fraud, when a query may be permitted but on the facts of this case, no such situation existed.

[3] In running accounts of this kind where the parties have agreed on a method of arriving at a quantum, the defendant was not entitled to such a cross check and they are bound by the method.

[Appeal allowed. Order accordingly.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff - Shah Balendran; M/s. Balendran Chong & Bodi
For the defendant - Joseph Au; M/s. Malek & Joseph Au

JUDGMENT

VC George J:

This appeal is against the dismissal by the learned Senior Assistant Registrar of the plaintiff's application for summary judgment.

The plaintiff's claim was for the sum of RM105,782.50 which amount is claimed to be the balance due for the supply of earth to the defendant pursuant to the terms of a written contract entered into between the parties dated 18 February 1981. The plaintiff was required to supply earth to the defendant at the agreed rate of RM16.50 per lorry load of 6 cubic yards "as measured on the lorry". The plaintiff had agreed to supply at least 4,500 lorry loads in a 30-day period. The agreement provided that in the event he supplied less than that amount per 30 day period he was required to pay all costs, claims, damages, fines, penalty and other proceedings which may be taken against the defendant by the main contractor.

It was a term of the contract that the defendant was to make payment to the plaintiff on a monthly basis and within 7 days of the receipt of a statement of account and invoices in respect of the amounts due and payable at that stage. Half monthly statements of accounts were rendered based on bills sent. On the statement of account an endorsement "if you do not agree with the above balance please inform us within 2 weeks". From time to time certain amounts were paid by the defendant to the plaintiff and then came a situation where a cheque was dishonoured it not having been arranged for. This cheque was replaced by another but when this was presented, the plaintiff learnt that the defendant had instructed the bank to stop payment of the cheque. Two other cheques drawn in favour of the plaintiff by the defendant suffered a similar fate.

Although the contract was dated 18 February 1981 in fact the arrangement between the parties was in effect since June 1980. From June up to October the parties appear to have been happy with each other. There was a systematic practice of the servant or agent of the defendant issuing a delivery receipt in respect of each lorry load delivered which specified time date and volume of earth and lorry number. The defendant contends that in October, 1980 they noticed that the quantity of earth in the lorries was below the required 6 cubic yards. They complained to the plaintiff and on the plaintiff's undertaking to supply in future the agreed amount, their servant or agent continued to issue delivery receipts acknowledging receipt of the lorry loads specifying date, time and volume, in each case 6 cubic yards.

However, on 12 January 1981 in respect of the 121 lorry loads delivered on that day, acknowledgement of the delivery of the earth was made but the volume of earth in each lorry load was not specified in the delivery receipt. Some discussion appears to have taken place on that day which resulted in the delivery of the lorry loads thereafter, being acknowledged as being 6 cubic yards. In the meantime, letters were being sent in respect of the dishonoured cheques and the plaintiff contended that because they were not being paid they stopped delivery.

The defendant has filed a statement of defence and took out a counterclaim in respect of certain amounts which they claim they are entitled for the hire of vibrator compactors and the overcharging for the hire of certain vehicles.

I think there is a short answer to this dispute. In effect the terms of the contract between the parties called for there to be an account stated between the parties every month, the account stated to come about by the plaintiff delivering a statement of account, the defendant having 2 weeks within which to query the accounts. The law is that in the event of non-query an account stated came into existence which creates an estoppel against the defendant from querying the accounts thereafter. There are situations, for example if there is fraud, when a query may be permitted but on the facts of this case, in my opinion, no such situation exists. Particularly as the defendants were on notice in October of the lorries not being loaded to the specific capacity and they thereafter continuing with the system of issuing of delivery receipts acknowledging even the quantum of earth, I think that the defendants have waived any right to complain that they may have had and cannot now be heard to rake up what was settled by way of the account stated.

Admittedly, there are ways and means of finding exactly how much earth was transferred to the site but, he having agreed to the method by which an account stated would be arrived at between the parties, the defendant is not entitled to such a cross check.

In running accounts of this kind where the parties have agreed on a method of arriving at a quantum they are bound by that method.

I allowed the appeal and ordered that final judgment be entered against the defendant in respect of the RM105,782.50 less 121 x RM16.50 together with interest thereon at 8% per annum from the date of the writ that is 20 March 1981 until realisation. I granted unconditional leave to defend in respect of the 121 x RM16.50 on the basis that the defendant had within the agreed time queried the volume of earth supplied by those 121 loads. It was also my order that the defendant pay 50% of the costs of the appeal and 50% of the cost of the O. 14 proceeding before the Senior Assistant Registrar.

Also found at [1983] 1 CLJ 256